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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 180.

GEORGIA HARDWOOD LUMBER COMPANY,
Petitioner,

—against—

COMPANIA DE NAVEGACION TRANSMAR, S. A.,
Owner of the S. S. KOTOR,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILBUR E. DOW, JR.,
Counsel for Respondent.

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Opinions Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in 141 Fed. (2d) 652 (1944). The opinion of the District Court is reported in 48 F. Supp. 402 (1942).

The Questions Presented.

I.

Where notice of appeal has been timely served and filed, the District Court Judge setting the amount of the bond at the time of filing, is it necessary that the appeal be formally allowed by the District Court

Judge within the 90-day period, where he formally allowed the appeal at a later date, filing an order as part of the record (R. 112) wherein he stated that he knew the appellant was appealing, had not indicated any intention of not allowing it but was of the opinion at the time that formal allowance was no longer necessary?

The Circuit Court held that the appeal was perfected, its jurisdiction established and "that it does not at all advance the cause or the appearance of justice to deny to what appellant did the legal effect it was designed to achieve".

II.

Where timbers were loaded on railroad flat cars, hauled a distance, weighed by certified Weighing Masters and railroad bills of lading issued showing the weights on each car (average weight per board foot 61.75 pounds), after which the timbers were hauled to tidewater and there loaded aboard a ship under a contract of affreightment containing a warranty of a maximum weight per board foot (in this case, 4 pounds) does the burden of proof as to a loss of weight in transit from railroad scales to contract specifications at ship's side lie with the shipper claiming the loss in weight or the ship receiving the timbers?

The District Court held it rested with the ship. The Circuit Court, in a reversal, held it rested with the shipper claiming the change in weight. * * * The evidence of the rail weights was sufficient unless overthrown to entitle libellant to judgment. In the face of the positive rail weights obtained and furnished

by respondent (shipper), it was not sufficient for respondent to offer opinion testimony of the vague and unsatisfactory nature of that offered. * * *".

Short Statement of the Facts.

Libellant, owner of the SS "Kotor" of Panamanian registry, through their New York agent, Garcia & Djaz, acting through a freight broker, Cavalier Shipping Company which represented both libellant and respondent as a broker, contracted to carry "*,* * 750,000 board feet of pine timbers not exceeding 4 pounds per board foot at $70.00 per 1,000 feet * * *". The contract was signed by both parties. The respondent did not ship these timbers, all heavy joists, 6 x 6 inches and 10 x 10 inches, from its own mills but purchased them at six different points throughout Florida, Alabama and Mississippi, of which about 75% came from Century, Florida and Brewton, Alabama. Most of these timbers were "water-stored"; that is, had been in mill ponds from two months to a year, were hoisted aboard flat cars and carried from 40 to 60 miles by rail and weighed from 24 to 48 hours after leaving the water and while en route to Jacksonville. These timbers averaged 43¼ pounds to the board foot at time and place where and when weighed by certified railway Weighing Masters. After remaining in Jacksonville from 1 to 5 days, these timbers were loaded aboard the ship. The weather throughout the south was extremely humid, particularly at Jacksonville, where it rained every day but two during the time the first car arrived at Jacksonville until the last car was loaded aboard the ship.

Respondent declined to pay freight except on the basis of its contract maximum of 4 pounds to the board foot and the balance due on the basis of the railroad weights was computed at approximately $9,300 and this sum deposited in escrow in the Atlantic National Bank of Jacksonville for subsequent arbitration. As arrangements were made by telephone between New York and Jacksonville agents, representing the carrier, and respondent's attorneys in Jacksonville, no arbitration agreement was signed. After the vessel sailed, respondent's President, Mr. Cheatham, declined to arbitrate, and libellant being unable to compel arbitration, commenced this action.

A complete resume of the facts, fully documented, appears in the opinion of the Circuit Court of Appeals.

The facts as submitted by counsel for petitioner differ in a number of small but important particulars. The timbers were not still wet from immersion in the water at the time they were weighed which took place from 24 to 48 hours after they were removed from the ponds. *Most of these timbers had been stenciled at the ponds before loading on the flat cars* which petitioner's witness Parker testified could not be done unless the timbers were surface dried (R. 68).

The separation strips between the timbers on the car were only sufficient for and for the purpose of stiffening the load and were not intended to air dry the timbers.

The first libellant knew that the weights per board foot were running in excess of the 4 pounds per board foot stipulated in the contract was when the timbers on the cars arrived at Jacksonville for loading. There was no indication whatsoever before that time that such would be the case. The only weights

ever provided by the petitioner were on the railroad bills of lading, certified by the railroad Weighing Masters, and they averaged about 4.75 pounds per board foot.

The ship's agent was willing to weigh sample cars, an easy matter involving comparatively little expense and time due to the identical nature of the timbers. It was unwilling to weigh the entire shipment and hold the vessel at the dock while this was being done. There were no scales at the docks and the entire shipment would have had to be hauled elsewhere for this purpose (R. 98).

Petitioner did not pay the full freight as per contract but only on the minimum basis of 4 pounds to the board foot, posting the balance in escrow with the Atlantic National Bank of Jacksonville for arbitration which was later refused and which resulted in the bringing of this action.

Petitioner's statement of the facts makes no reference to the weather conditions prevailing in the area at the time, which were extremely wet and humid, which all witnesses agreed would retard, if not altogether stop, any loss of moisture after the surface water had run off when hauled from the ponds.

POINT I.

The decision of the Circuit Court of Appeals on the jurisdictional question involved was proper and reasonable and in accord with the decision of other courts.

Under 28 U. S. C. A., Sec. 230, concerning appeals, "application therefor shall be made within three months after the entry of such judgment or decree".

On July 6, 1943, well within the three months' period, libellant's proctors served on respondent's proctors a copy of the notice of appeal and received admission of service thereof. The original notice of appeal was then forwarded to libellant's corresponding proctors in Augusta, Georgia, for service upon respondent's corresponding proctors, also of that city, and for filing with the District Court Clerk in Augusta, all of which was done on July 12, 1943. At this time and at the time of filing the notice of appeal libellant's Augusta proctors consulted the District Judge on the amount of the appeal bond as this was only the fourth admiralty case in the Southern Division of Georgia and, we were advised, the first to go up on appeal. Judge Lovett fixed bond at $250. The National Surety Company bond was procured on July 16 in the required amount and mailed to Augusta, where it was filed on July 21, together with the assignment of errors.

It has been repeatedly held that an allowance of an appeal, where application has been timely served, does not have to be made in any particular form or in any particular language, but that it can be spelled out from the conduct, intention, or expression of the District Judge. *U. S. v. Beaman*, 61 Fed. (2d) 493 (CCA 5th, 1932). The Court therein cited *Brandies v. Cochran*, 105 U. S. 262 (1882).

To the same effect is *The Bath*, 20 Fed. (2d) 314 (CCA 3rd, 1927). The appellant there filed his application within the 90 day period. The Court did not allow it until later and then *nunc pro tunc* as of the last day to file. The Appellate Court there said:

"If the appellant was late in applying for the

allowance of an appeal there is substance in the ground for dismissal because the limitation of this section is mandatory and therefore jurisdictional. *Maina* v. *Bodine* (C. C. A.), 16 F. (2d) 463; *The Steam Tug Albatross* v. *United States* (C. C. A.), 19 F. (2d) 141. When the time for applying for allowance of an appeal has expired it cannot be called back or revived by a *nunc pro tunc* allowance. *Credit Co.* v. *Arkansas Central Railway*, 128 U. S. 258, 261, 9 S. Ct. 107, 32 L. Ed. 448. But the provision limiting this court's appellate jurisdiction does not refer to the date of the granting of an application for the allowance of an appeal. On the contrary, it is confined to the 'application therefor * * *' within three months after the entry of such judgment or decree'. When applied for within the statutory period the law is satisfied and the right to an appeal subsequently allowed is established on the principle followed in *Weaver* v. *Blair, Commissioner* (C. C. A.), 19 F. (2d) 16. Delay by a court in allowing an appeal seasonably applied for can not defeat the applicant's right of appeal" (p. 316).

You would otherwise have the judicial version of a pocket veto. See also *U. S.* v. *Todor*, 41 Fed. (2d) 146 (CCA 7th, 1930). Application was filed in time but the Judge did not allow the appeal until much later, then *nunc pro tunc* as of the date filed. The Court held this to be in compliance with the statute. *Douglason* v. *Baltimore Acceptance Corp.*, 38 Fed. (2d) 215 (CCA 3rd, 1930), goes even further on this point. No papers of any kind were fixed within the statutory period, but there was some evidence that the Trial Judge had intended to allow the appeal. The Circuit Court sent the parties back to the Dis-

trict Court for it to determine whether or not it *had* allowed an appeal."

Concerning the above the Circuit Court of Appeals spoke as follows:

> "We agree with appellant. It is quite plain that it was endeavoring to appeal. That the Judge and everyone else concerned thought it was effectively appealing, the record leaves in no doubt, and but for the language of the opinion in the *Alaska* case, which, though not directly in point, is disturbing, we should not hesitate to hold: that what appellant did amounted to a timely application to appeal; that it was granted; that the appeal was perfected; and that our jurisdiction became established. It is quite clear that it does not at all advance the cause or the appearance of justice to deny to what appellant did the legal effect it was designed to achieve. We think that *R. F. C. v. Prudence Group* and the other cases cited above warrant our taking jurisdiction and denying the motion to dismiss."

Petitioner relies heavily upon *Alaska Packers v. Pillsbury*, 301 U. S. 174 (1937), decided before the adoption of the new Federal Rules which simply held, and rightly so, that mere notice of intention to appeal does not and cannot constitute an application and allowance of an appeal. In the case at bar the notice of appeal was filed on the same day on which the District Judge was consulted on the amount of appeal bond, and which he fixed at $250. This bond was executed four days later at New York and filed with the Clerk in Augusta on July 21. This alone is quite sufficient as this Court decided in the case of *Brandies v. Cochrane*, above.

In the *Alaska* case, decided prior to the new Rules of Civil Procedure, the Court had before it the question of "whether an appeal to a Circuit Court of Appeals from a decree in admiralty in a District Court may be taken by simply filing in the office of the Clerk of the District Court, and serving on the proctor of the adverse party, a notice of appeal". Assuming for the moment that this case is controlling (and in view of the effect given to the notice of appeal in the Civil Rules, subsequently adopted, even though they do not apply to admiralty, and a subsequent Supreme Court case, *R. F. C. v. Prudence Group*, 311 U. S. 579 (1941), there is some doubt of this), the trial Judge in the case at bar still allowed the appeal, timely made, within the 90 day period. Even though the controlling statute, 28 U. S. C. A., Section 230, makes no reference to the time *when* the application for review shall be allowed, taking the *Alaska Packers* case at its face value, the appeal herein was allowed within 90 days of the date of the decree by both the action and intention of the trial Judge, a judicial act as this Circuit has held. In the *Alaska Packers* case the Court said at page 177:

> "The reasons for requiring that an appeal be duly applied for and allowed is that there may be some assurance that the suit is one in which there may be a review in the circuit court of appeals; that the decree is of such finality or character that it may be re-examined on appeal; and that appropriate security for costs may be taken where the appellant is not by law exempted from giving such security. * * *"

The subsequent formal signature of the Court, which the Court itself did not believe necessary at

the time, was merely the perfection of the appeal, timely made and timely allowed. We submit that the propriety of review, the finality and character permitting re-examination and the amount of the appropriate security were all properly considered by Judge Lovett on July 12th, when the matter was before him. We presume that it was with due deliberation that he considered these matters and then and there determined to allow the appeal, omitting only his formal signature, which he later supplied. As stated above, this Circuit has held that a judicial act, to be valid, need not necessarily be in writing accompanied by the Judge's signature, the judicial act of allowance being spelled out from his conduct and expression with respect to other matters in the appeal, and as further evidenced by his *nunc pro tunc* order of August 30th.

Since the decision of the case at bar by the Circuit Court of Appeals for the Fifth Circuit, a similar case arose in *Miller* v. *Tietjen & Lang No. 2*, as yet unreported in the Federal Reporter but appearing now in 1944 A. M. C. 949, in the Third Circuit. In that case a notice of appeal was filed in the District Court before the 90-day period expired but the Judge did not sign it until sometime later. The Court there said:

> "Since appeals in the great majority of cases coming to this court are now required to be taken by the filing of a notice of appeal in the district court, this court in the interest of uniformity of procedure has directed by Rule 11 (1) that appeals in admiralty cases shall also be taken by filing a notice of appeal in the district court. The notice of appeal thus filed we regard as a 'due

and sufficient application for the formal allowance of the appeal. In this respect we follow the practice of the Circuit Court of Appeals for the Second Circuit. See rule 38 of that court. See also *Compania de Navegacion Transmar* v. *Georgia Hardwood Lumber Co.*, 1944 A. M. C. 575, 141 F. (2d) 652 (5 CCA, 1944). Compare *R. F. C.* v. *Prudence Group*, 311 U. S. 579 (1941).

In the present case the decree appealed from was entered in the district court on February 7, 1944 and the respondent's notice of appeal was filed in that court on May 4, 1944. Treating the notice as the application for the appeal, in accordance with our practice, it will be seen that the appeal was applied for within three months after the entry of the decree. The application was, therefore, in time.

The appeal was allowed on June 5, 1944, more than three months after the entry of the decree, by a judge of this court acting under the authority conferred upon him by Sec. 132 of the Judicial Code, 28 U. S. C. Sec. 228, his order of allowance being endorsed upon the copy of the notice of appeal filed in this court. The fact that the appeal was not allowed within three months after the entry of the decree is immaterial, however. It is settled that if the application for an appeal was made in time the mere date of its allowance is not controlling. *United States* v. *Vigil*, 77 U. S. 423 (1870); *Cardona* v. *Quinones*, 240 U. S. 83 (1916). An appellant may not be deprived of his right to an appeal by reason of the failure of a judge to act promptly upon his application.

The motion to dismiss the appeal is denied."

The facts in the *Pio Gon and Long No. 2* are not as strong as in the case at bar. There the notice of

appeal was merely filed but no action taken by the court on the bond, yet the Circuit Court of Appeals held this was sufficient application for allowance to satisfy the rule which has never required a court to act upon it within any given length of time. The Third Circuit Court cited this case at bar with approval in its opinion.

POINT II.

There has been no misconstruction by the Circuit Court of Appeals of the facts, the nature of the contract or the law of evidence.

The weights of the timbers as found and certified to by the railroad Weighing Masters were the only weights ever submitted by the shipper to the ocean carrier. The Circuit Court of Appeals properly held that if the shipper would then dispute positive weights as furnished by himself, he must do so in a convincing fashion and not in the vague and unsatisfactory manner of the testimony offered. Petitioner goes into great detail and cites many cases to show that there is no presumption of continuance of anything which is changeable in nature. No one questions this logic, but where a shipper obtains and furnishes, to an ocean carrier, positive railroad weights, he can only overthrow these weights by clear and convincing testimony to the contrary. Simply because he wishes to alter them does not thereby shift the burden of proof as to the actual weight of the timbers at shipside to the carrier who is perfectly willing to accept the actual and positive weights which the carrier has furnished him.

The Carriage of Goods by Sea Act, 46 U. S. C. A. 1303, states that:

> "(5) **Guaranty of statements.** The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper."

The mere statement, by the shipper, in the face of contrary certified railroad weights, that they now meet a certain contract maximum, is not furnishing a weight, in the absence of proof of such a statement. This section of the statute puts the burden of proof as to the weight of goods squarely on the shipper; usually the only party in a position to know, in fact, makes him its guarantor in express words. By adoption of this Act, known as The Hague Rules, Congress followed the practice of all other maritime nations of the world.

As the appellate court has so carefully pointed out, the shipper's evidence of loss in weight during railroad transit, "vague and unsatisfactory" though it is, shows not that the timbers came down to the weight specified in the contract of affreightment, but that they did *not*.

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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